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No. 91-92

In The

Supreme Court of the United States

October Term, 1991

CAERNARVON TOWNSHIP, et al.,

Petitioners,

v.

MORGANTOWN PROPERTIES,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Have Petitioners raised any issue of federal law so special and important as to warrant review via certiorari jurisdiction?

2. Do Petitioners, who are neither residents of nor owners of land within a proposed borough, have standing to attack the constitutionality of a statute of the Commonwealth of Pennsylvania on the basis that it authorizes resident landowners, but not residents who do not own land, to initiate the borough incorporation process by the filing of a petition?

3. Assuming that Petitioners have standing to raise the issue, does Pennsylvania's procedure for incorporation of boroughs establish an unconstitutional prerequisite to participation in the political or electoral process when nonlandowning residents of the proposed borough, who, although unable to initiate the incorporation process, are permitted to, and, in this case, did serve on the Borough Advisory Committee, did participate in months of hearings regarding the question of incorporation, and did vote on the question of incorporation?

4. Where the Petition for Writ of Certiorari refers only to an unspecified and vague constitutional challenge raised by Petitioners in the court of first instance, have Petitioners preserved the right to argue the equal protection violations they now assert before this Court?

5. Assuming that the issue has been preserved, does a statute which grants the right to vote on the question of borough incorporation to all residents of a proposed borough who will be subject to the borough government, but

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

not to those residing outside the borough (but within existing governmental units from which the new borough will be carved), violate the equal protection clause?

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STATUTORY PROVISIONS INVOLVED

Petitioners quote only a small portion of the Pennsylvania Borough Code's process for incorporation of a borough. Section 202 of the Borough Code, 53 P.S. § 45202, as amended in 1981, is set forth in its entirety below:

§ 45202. Applications for incorporation

(a) The application for incorporation shall be by a petition signed by a majority of the freeholders residing within the limits of the proposed borough, when all parts of the proposed borough are in the same township, and, where portions of the proposed borough are in different townships, the petition shall be signed by a majority of the freeholders residing in each of such separate portions. The signatures must be secured within three months immediately preceding the presentation thereof to the court. Such petition shall be subscribed by and sworn to by at least one of the signers. The number of signers required to the petition shall be ascertained as of the date the petition was presented to court.

(b) The court shall establish a Borough Advisory Committee which shall consist of two residents of the proposed borough, two residents of the existing governmental unit or units recommended by the respective governing body of the unit or units and not residing within the proposed borough and one resident of the county not residing in either area who shall serve as the chairman of the committee. Such a committee shall be established when a petition is received by the court for the creation of a borough. Pursuant to this act, the members of such committee shall be appointed by and shall serve at the pleasure of the court. The members shall serve without salary, but the court may

entitle each such member to reimbursement for his actual and necessary expenses incurred in the performance of his official duties. The director of the County Planning Commission shall serve as advisor to the committee.

(c) Such committee shall, within sixty days of its creation, advise the court in relation to the establishment of the proposed borough. In particular, the committee shall render expert advice and findings of fact relating to the desirability of such an incorporation, including, but not limited to, advice as to:

(1) the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services;

(2) the existing and potential commercial, residential and industrial development of the proposed borough; and

(3) the financial or tax effect on the proposed borough and existing governmental unit or units.

(d) The Court, if it shall find, after hearing and advice of the committee, that the conditions prescribed by this section have been complied with, shall certify the question to the board of elections of the county for a referendum vote of the residents of the proposed borough. Upon receipt of the certified election results, the court shall enter a final decree granting or denying the prayer of the petitioners.

COUNTERSTATEMENT OF THE CASE

The Process of Incorporation Under Pennsylvania's Borough Code

Pursuant to the Commonwealth of Pennsylvania's statutory procedure for the incorporation of boroughs ("Borough Code," 53 P.S. § 45201 *et seq.*), as amended by its legislature in 1981, Morgantown Properties ("Morgantown") filed a Petition for Incorporation ("Petition") with the Court of Common Pleas of Berks County on August 11, 1987. The Borough Code provides for the initiation of the lengthy incorporation process by a majority of resident freeholders[1] of the proposed borough.[2] Their role,

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[1] For purposes of this Brief, the words "freeholder" and "landowner" are synonymous.

[2] The proposed new borough, the Borough of New Morgan, is comprised of approximately 3,671 acres of land, 2,394 of which are situate in Caernarvon Township and 1,277 of which are located in Robeson Township (App. 26a). Robeson Township is not a party to the Petition for Writ of Certiorari. Morgantown proposes an $800,000,000 development plan which will employ over 12,000 persons from which a permanent population of approximately 9,000 is expected to emerge (App. 10a-11a). Central to the plan is the development of a Victorian Village, a national tourist attraction with an estimated 25,000 visitors per day, which will include a 1,000-room hotel and an 18-hole golf course. In keeping with the Victorian concept, transportation throughout the village itself would be by horse-drawn vehicle, trolley and steam-driven trains only; automobiles would not be permitted. The Borough of New Morgan will also contain planned residential developments, a cultural center, a mixed use center, commercial and agricultural areas and open spaces (App. 27a-28a). As Petitioners choose to emphasize in their Petition for Writ of Certiorari, a landfill is also proposed. The total acreage allotted for the

(Continued on following page)

however, is only to suggest the boundaries of the new borough. Thereafter, the Borough Code calls for the common pleas court, a court of general jurisdiction within the county, to appoint a Borough Advisory Committee to hold hearings and make recommendations on the proposed incorporation. Ownership of real estate is *not* a prerequisite to membership on the Borough Advisory Committee. Following consideration of the recommendations of the borough Advisory Committee and after a hearing of its own, the court of common pleas, if it finds that all statutory standards for incorporation have been met, certifies the incorporation question to the board of elections of the county for a vote of all residents of the proposed borough, landowners and nonlandowners alike. Upon a favorable vote, the court of common pleas will enter a final decree incorporating the borough. 53 P.S. § 45202.

Pursuant to the Borough Code, the Petitioners herein, and others, filed exceptions to the Petition. 53 P.S. § 43204. Although the Petitioners have neglected to say so in their Petition for Writ of Certiorari, it is important to note that *none* of the individual Petitioners before this Court were or are either residents of or owners of land within the proposed new borough.

(Continued from previous page)

landfill project is 400 acres of the new borough, although the landfill itself will utilize only a portion of that tract. (App. 26a-27a.)

Proceedings of the Borough Advisory Committee

In accordance with section 202(b) of the Borough Code, Judge Thomas J. Eshelman, Jr. of the Court of Common Pleas of Berks County established a Borough Advisory Committee consisting of two residents of the proposed borough, a Supervisor of Caernarvon Township, a Supervisor of Robeson Township, and a fifth member who did not reside in either of the townships or the proposed borough (App. 3a, 4a). The two residents of the proposed borough who served on the Borough Advisory Committee did not own land within the proposed borough. Between the first part of December of 1987 and February of 1988, the Borough Advisory Committee held over fifteen days of hearings, during which more than one hundred hours of testimony was taken (App. 25a). A total of 67 exhibits were marked, considered by the Borough Advisory Committee and entered into the record (App. 50a). The Petitioners herein presented evidence and participated fully throughout the lengthy process. The Borough Advisory Committee voted three to two in favor of incorporation (the dissenters being the supervisors of Caernarvon and Robeson Townships), and the Court of Common Pleas of Berks County, after hearing, adopted the Committee's majority report as the court's Findings of Fact and Conclusions of Law.

Findings of the Borough Advisory Committee and the Court of Common Pleas

Pursuant to section 202(c) of the Borough Code, the Borough Advisory Committee and, in turn, the court of common pleas, were directed to consider a broad range of issues involving varying interests including:

> (1) the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services;
>
> (2) the existing and potential commercial, residential and industrial development of the proposed borough; and
>
> (3) the financial or tax effect on the proposed borough and existing governmental unit or units.

With respect to the balancing of the advantages and disadvantages of incorporation, the Borough Advisory Committee found that:

> 1. The large area to be developed which remains unsettled and with virtually no population lends itself to "self-styling"; and, therefore, would not disadvantage the remaining townships.
>
> 2. The existing municipalities, not having encouraged nor provided incentives to the applicant or previous owners to develop the area, would now welcome the new development and, therefore, not suffer any significant adverse effects.
>
> 3. The economics of all municipalities can only benefit from the development of the heretofore dormant tract . . . .

(App. 14a.) The court of common pleas, in adopting these findings, noted that this 3,700 acre tract had lain "virtually dormant and undeveloped for the past ten years." (R. 79a.)

The Electoral Process – Residents of Proposed Borough Approve Incorporation

Upon the recommendation of the Borough Advisory Committee, and having found that the conditions of section 202 had been complied with, on March 30, 1988, the court of common pleas certified the question of incorporation to the Board of Elections for Berks County for a vote of *all residents* of the proposed borough (whether landowners or not), again as required by the Borough Code. The results of the vote were overwhelmingly in favor of incorporation. Of the eleven registered voters, nine (9) voted in favor of incorporation and only one (1) vote was cast in opposition to incorporation. Accordingly, by Order dated May 10, 1988, the Petition for Incorporation of the Borough of New Morgan was granted. (App. 47a.)

Pennsylvania Appellate Courts Affirm Incorporation

Appeals followed by the petitioners to the Pennsylvania Commonwealth Court and then to the Pennsylvania Supreme Court. According to the Petition for Writ of Certiorari, the only pleading in which a constitutional issue, albeit a vague one, was raised in the court of first instance was the Petition for Leave to Intervene and Exceptions to the Petition for Incorporation.[3] There, the Petitioners alleged:

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[3] Rule 14.1(h) of the Supreme Court Rules requires the petitioner to "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised." Petitioners' only attempt to comply with this rule, as regards the trial court, is on page 4 of their Petition for Writ of Certiorari.

> 8. If a "freeholder" is interpreted to mean "landowner," then the Act of July 10, P.L. 247, 53 P.S. 45201 *et seq.*, is unconstitutional and the Act is void and of no effect.

(App. 58a.) In the commonwealth court, however, petitioners tried to explain this cryptic objection by arguing first that the Borough Code somehow impinged the right to vote of those residing in the proposed borough. The commonwealth court dismissed this argument as follows:

> We do not propose to treat Appellants' argument lightly, but we fail to see a constitutional voting issue in this case. Section 202 flatly states that all residents of the proposed borough are eligible to vote after a petition for incorporation has been filed with the court of common pleas. Property ownership is indeed a prerequisite to petitioning the court of common pleas. However, the only restriction on *voting* is based on residency. Accordingly, section 202 does not require property ownership as precondition to voting and, therefore, does not unconstitutionally infringe on the right to vote.

(App. 30a.)

The supreme court also dismissed this argument:

> [I]t is claimed that the Borough Code is unconstitutional in that it requires property ownership in order to apply for incorporation. This argument, too, must fail, for the constitutionally critical consideration is who may vote, not who may apply, and although only freeholders are permitted to apply for incorporation, any resident of the area affected may vote on the issue.

(App. 16a.)

The Petitioners also contended that the Borough Code is somehow unconstitutional because, although *all*

residents of the proposed borough may vote on the proposed incorporation, those residing outside the proposed borough may not. This contention is not contained in the Exceptions filed by the Petitioners in the common pleas court. (App. 56a.) On this issue, the commonwealth court ruled:

> Appellants' argument is based on the fact that the residents of the Townships are not entitled to vote on the incorporation of the new borough. Appellants contend that section 202 permits the alteration of the government of the Townships without the consent of those governments, i.e., the people of the Townships. However, section 202 does not authorize an alteration of government without the consent of the people. Instead, section 202 provides for creation of a government, subject to the will of the people.

(App. 30a-31a.)

The supreme court also found the argument to be without merit:

> Appellants also assert that the Borough Code is unconstitutional because it undercuts the right of self-determination of the residents of existing communities. We disagree. The glass is half full, not half empty. The code permits the residents of the proposed borough to voice their views and to determine the form of government under which they will live.

(App. 16a.)

In their Petition for Writ of Certiorari before this Court, the Petitioners raise new constitutional attacks. With respect to the issue regarding the filing of a petition for incorporation by a majority of freeholders of the

proposed borough, petitioners now claim that resident nonlandowners (a class to which none of them belongs) are somehow being denied "participation in the political or electoral process," or that landownership is an unconstitutional "prerequisite to petition for a referendum of general application." With respect to their complaint that nonresidents of the proposed borough do not vote on the Petition, their argument is now cast in terms of equal protection, a theory not heretofore asserted. The failure to preserve these issues below is reason enough to refuse to grant certiorari in this case. In any event, a review of these issues reveals that they are substantively flawed as well.

REASONS FOR REFUSAL OF THE WRIT

A. The instant case presents no issue of federal law so special and important as to warrant review via writ of certiorari.

The instant case comes before this Court nearly four years after the filing of a Petition for Incorporation by Morgantown. During that period, the Borough Advisory Committee, the Court of Common Pleas of Berks County, the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court have exhaustively considered a record now measured in volumes instead of pages. All interested parties have been heard, and the scope of the inquiry, as defined by the Borough Code, has been exceedingly broad. The issues central to the determination of borough incorporation, as identified by Pennsylvania's Borough Code, are peculiarly local ones and present no genuine federal issue. Determinations such as

the adequacy of community support services, the existing and potential commercial, residential and industrial development of land within the Commonwealth, and the respective advantages and disadvantages of borough incorporation are traditionally made by the State, so that unique economic and geographic concerns are fully considered. Simply put, every Pennsylvania court involved in the process has determined that the evidence overwhelmingly supports incorporation, and the constitutional afterthoughts now asserted by Petitioners are nothing more than still another attempt to reverse these factual determinations.

As stated by this Court in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955), certiorari may be granted only when "special and important reasons," beyond the merely "academic and episodic" and of interest to more than "particular litigants" arise. No such reasons exist in this case. The central issue raised by the Petitioners before this Court, the constitutionality of the landowner/nonlandowner classification for the right to initiate the incorporation process, is truly an "academic" one. These Petitioners are not even members of the class allegedly discriminated against, i.e., nonlandowning residents of the proposed borough. Their attempt to assert rights of those who are is misdirected in that those who actually are nonlandowning residents of the proposed borough voted overwhelmingly in favor of incorporation. In short, Petitioners are asking this Court to review a constitutional issue which is not theirs to raise and which was not raised by those who could have raised it.

It must also be noted that Petitioners suggest no reasons to this Court why review of the overall process of borough incorporation under the Borough Code is of import to any one beyond them, and, indeed, they choose to not even describe that process, in its entirety, to this Court. Their strategy of focusing on but portions of that process, without discussion of the many and varied ways that the process is designed to, and did, protect interests of all concerned, unduly exaggerates the significance of the issues they assert. It is submitted that this case, when the issues are properly framed, lacks the "special and important" quality requisite for the grant of certiorari.

B. The land ownership requirement for the filing of a petition for incorporation is neither an unconstitutional prerequisite to participation in the political or electoral process, nor an unconstitutional prerequisite to petition for a referendum of general application.

1. The Petitioners lack standing to attack the Borough Code's freeholder requirement for the filing of a petition for incorporation.

As stated by this Court in *United States v. Raines*, 362 U.S. 17 (1960), "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . ." A "closely related corollary" of this rule is that "a litigant may only assert his own constitutional rights or immunities." *Id.* at 22.

Petitioners' primary challenge to the Borough Code is that only resident landowners within the proposed borough, not residents who own no land therein, may

initiate the incorporation process by the filing of a petition. However, the petitioners in this case are not residents of the proposed borough. Nonetheless, they are attempting to assert rights which flow, if at all, only to those so situated. In other words, a statute which grants the right to petition for incorporation to resident landowners of the proposed borough, but not to residents who own no land, has no effect on and can cause no injury to individuals who are not even residents of the proposed borough. See *Turner v. Fouche*, 396 U.S. 346 (1970) (where challenged legislation involved a classification of landowner and nonlandowner, the district court's granting of a motion to intervene of a nonlandowner was "for the express purpose of adding a party plaintiff to the case to ensure that the court could reach the merits of [the] issue.") *Id.* at 361, n.23. Indeed, there is not even a suggestion anywhere in the record that any nonlandowning resident of the proposed borough was ever precluded from filing a petition and, given the overwhelming vote in favor of incorporation, a vote in which those nonlandowning residents fully participated, the result which did obtain was desired by all but one sole resident. Accordingly, the issue is an academic one, and these nonresident petitioners have no standing to raise it.

2. The Borough Code does not establish any unconstitutional impediment to participation in the political or electoral process.

Until the filing of the instant Petition for Writ of Certiorari, the Petitioners had sought, without success, to argue to both the commonwealth court and the supreme court that a nonlandowner resident's right to vote on the

incorporation issue was somehow unconstitutionally infringed by the Borough Code. The argument was flatly rejected by both courts for good reason. Section 202(d) of the Borough Code specifically requires a vote "of the *residents* of the proposed borough." (Emphasis added.) There is no land ownership requirement for the right to vote on the issue, and, as found by Pennsylvania's appellate courts, there is no "right to vote" issue involved in this case. Indeed, the residents of the proposed borough could clearly have defeated incorporation by voting against it.

Before this Court, the Petitioners, focusing on only a portion of the statute, now contend that the Borough Code's requirement that only a majority of resident landowners may initiate the lengthy incorporation process establishes an unconstitutional prerequisite to "participation in the political or electoral process." The petitioners argue that this Court's decision in *Quinn v. Millsap*, 491 U.S. 95 (1989), is dispositive of the issue. Aside from the fact that Petitioners' argument in this Court was not preserved below and has been waived, *see, e.g., Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) ("a party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon"), the argument is without merit.

At issue in *Quinn* was the constitutionality of a provision of the Constitution of Missouri which authorized the creation of a "board of freeholders" to propose a reorganization of the governments of the City of St. Louis and St. Louis County. In holding that the landowner requirement

for service on the board was not rationally related to any legitimate state purpose and thus violated the equal protection clause, this Court noted that "[m]embership on the board of freeholders is a form of public service," which its earlier precedents, specifically *Turner v. Fouche*, 396 U.S. 346 (1970), had directed could not be limited to only those who own land. This Court was concerned with the "scope of [the Board's] mandate," to "draft and submit a plan to reorganize the entire governmental structure of St. Louis city and county." *Quinn*, 491 U.S. at 109. Given this broad mandate, this Court concluded that nonlandowner residents could not constitutionally be excluded from the board.

Quinn actually supports the result in this case, which does not involve a land ownership requirement as a prerequisite to "public service." Indeed, the only "public service" aspect of this case was that performed by the Borough Advisory Committee. Residents who do not own land are eligible to serve on that Committee, and, indeed, did so in this case. In fact, the requirements for the contents of a petition for incorporation call for nothing more than a suggestion of the name of the new borough and a description of the land to be included in it.[4] As set forth in 53 P.S. § 45203:

> *Contents of Petition.* The petition shall set forth the name of the proposed borough, with a particular description of the boundaries thereof and be accompanied with a plot of the same. . . .

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[4] The Petitioners state (at page 14) of the Petition for Writ of Certiorari that the voters are "limited to the question as proposed by the freeholder." This is misleading. A review of the record before the Borough Advisory Committee and the Pennsylvania courts reveals that numerous issues were raised and determined, and the scope of inquiry was exceedingly broad.

Certainly the submission of this information cannot be equated to the formulation of a "plan of reorganization" as the Petitioners would argue.

From the filing of the petition forward, the Borough Code assures that nonlandowning residents participate in the incorporation process. In this case, *two nonlandowning residents actually served on the Borough Advisory Committee,* and reviewed the sixty-seven exhibits and considered the voluminous testimony as to the advantages and disadvantages of incorporation. In accordance with the Borough Code, nonlandowning residents did appear before the Court and were heard on the issue. Finally, and ultimately, again in accordance with the Borough Code, all nonlandowning residents had an opportunity to vote on the question of incorporation, and were overwhelmingly in favor of it. Clearly, it is in the proceedings of the Borough Advisory Committee, and the subsequent proceedings before the common pleas court, where the type of public debate and discussion similar to that in *Quinn* occurs and, unlike the situation in *Quinn*, nonlandowner residents in this case were an integral part of that process, at every step of the process.

There is no "public service" involved in the mere filing of a petition for incorporation and, at the first step in the incorporation process where something akin to "public service" materializes, nonlandowner residents may, and in fact did, participate. The Borough Code's process for incorporation is, thus, constitutional.

3. The Borough Code provides a pragmatic and balanced approach to borough incorporation which recognizes the rights of both landowners and nonlandowners.

In a thinly disguised resurrection of their twice rejected claim that the Borough Code unconstitutionally infringes upon the right to vote, petitioners assert in Section I.B. of their Petition for Writ of Certiorari that the freeholder requirement for initiating the lengthy process of borough incorporation must be unconstitutional for some other unspecified reason, as it is a "prerequisite to petition for a referendum of general application." Every case cited by the Petitioners, however, involved a voting rights issue, and thus has no applicability to this case. See *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (right to vote at annual school district meetings); *Hill v. Stone*, 421 U.S. 289 (1975) ("dual box" election procedure); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (right to vote on general obligation bonds); and *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977) (majority voting system to approve a county charter). Indeed, the *Town of Lockport* decision was not even concerned with a landowner requirement. Accordingly, because the Borough Code not only permits nonlandowning residents to vote, but also assures their participation in a meaningful way at every stage of the incorporation process, it is a constitutional and effective procedure for the incorporation of boroughs.

The Petitioners acknowledge, as they must, that the several states have historically enjoyed wide latitude in matters of local government. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). Moreover, their citation to a list of statutes

which make land ownership a prerequisite to some activity, far from suggesting a reason for this Court to grant certiorari, instead suggests that those states have found good and valid reasons for continuing land ownership requirements in certain limited instances. A number of such reasons were identified by this Court itself in *Ball v. James*, 451 U.S. 355 (1981). In that case, the state of Arizona's voting scheme limiting election of directors to the water reclamation district to landowners and apportioning voting power by amount of land owned was held *not* to violate the equal protection clause. This Court based its decision on the fact that the water district did not possess or exercise normal governmental powers, and that its functions, even with respect to water issues, were narrow. This Court also noted that because the landowners' property was subject to liens to secure bonds, and also subject to the acreage based taxing power of the district, landowners had a disproportionate interest in the make-up of the district.

In comparing *Ball* to the instant case, it must first be noted that *Ball* involved a voting rights issue, where this Court has been historically alert to question any type of classification. No such issue appears here, and a constitutional infirmity is thus not involved in this case. Moreover, the mere filing of a petition which does nothing more than suggest the name of the proposed borough and outline its boundaries involves no exercise of any governmental power, not even something analogous to the narrow powers of the water district in *Ball*. The filing of the petition does nothing more than initiate what, in this case, was a lengthy debate and discussion of the entire

incorporation process, both procedurally and substantively. Again, the constitutional concerns in this case are even less acute than those presented in *Ball*.

Good reasons exist for the classification at this initial stage of the procedure for incorporation established by the Borough Code. In the first place, it is the petition which defines what land will be within the proposed borough and thus those whose land is to be so affected would have an obviously unique and particular interest. Secondly, similar to the situation in *Ball*, the landowners' status as landowners subjects them to a real estate tax, which a borough may levy pursuant to the power granted to it in 53 P.S. § 46302. Finally, to grant the ability to initiate the incorporation process to nonlandowners would provide disproportionate power to them. If incorporation of a proposed borough could be initiated by tenants and lessees, their will could be unfairly imposed on those who purchased land with a view toward living in a particular township. On the other hand, nonlandowning residents may prevent a unilateral change by landowners alone as they can defeat incorporation at the ballot box. Accordingly, assuming that this Court could or would ever reach the issue, the limitation imposed at the initial stage of the borough incorporation process is a rational one, preserving the rights of landowner and nonlandowner alike.

C. It is not a denial of equal protection of the law to limit the right to vote to all those residing within the proposed borough.

1. The Petitioners have not preserved below the equal protection argument they now raise in this Court.

The Petitioners now contend that it is a violation of equal protection of the law to deny the vote on incorporation to those who live outside the limits of the proposed borough. Although Petitioners, who are nonresidents of the proposed borough, do have standing to raise this claim, they did not do so in the courts below. Before the Pennsylvania courts, this issue was raised only as a violation of provisions of Pennsylvania's constitution,[5] with only vague and undefined claims that there was a federal constitutional violation involved as well. Again, the Court's decision in *Bankers Life, supra,* precludes consideration of the issue now raised at this final stage, and the language of *Bankers Life* warrants repeating: "[A] party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." Petitioners have not preserved their equal protection claims.

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[5] Of course, no constitutional violation was found by the Pennsylvania appellate courts.

2. The 1981 amendments to the Borough Code struck a practical and constitutional balance between the rights of those within and those without the proposed borough.

Both the commonwealth court and the Pennsylvania Supreme Court recognized, in the context of Petitioners' challenge pursuant to Pennsylvania's constitution, that it makes perfect constitutional sense to limit the vote on incorporation to those within the proposed borough. As aptly stated by the commonwealth court:

> Section 202 does not authorize an alteration of government without the consent of the people. Instead, section 202 provides for creation of government subject to the will of the people.

(App. 30a-31a.) This Court itself has stated that it is "uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68 (1978). Accordingly, even if the Petitioners' equal protection claims are considered by this Court, they are wholly without merit.

It must also be emphasized that prior to the 1981 amendments to the Borough Code, there was no provision requiring that the residents of the affected area be permitted to vote on the issue of incorporation. Conceivably, the prior act may have been deficient in this respect, because nonlandowning residents of the area proposed to be incorporated had little say in the process.

It is clear that in addressing the problem by way of the 1981 amendments, the Pennsylvania legislature attempted to balance the interests of those affected by giving *all residents* of the proposed borough the right to

vote, while at the same time limiting that right to only those living in the affected area. Obviously, had it done otherwise, incorporation of boroughs (a matter on which the Pennsylvania legislature and the courts look with favor)[6] would have come to an end. The remaining residents and the governmental units from which the borough would be carved would nearly always oppose the incorporation so as not to lose either tax revenues or control.

It is also clear that the Borough Code provides nonresidents, such as the individual Petitioners here, with ample opportunity to voice their concerns and interests throughout the incorporation process. That they did in fact do so is beyond doubt. The Borough Advisory Committee is directed by the express language of the Borough Code to consider, among other things, the financial or tax effect of borough incorporation upon the existing governmental units. 53 P.S. § 45202(c)(3). It was specifically found by the Borough Advisory Committee and the court

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[6] In one of the earliest cases which considered the matter of the incorporation of a borough, *Incorporation of the Borough of Edgewood*, 130 Pa. 348, 18 A. 646 (1889), the Supreme Court of Pennsylvania said:

> The law contemplates the formation of boroughs out of villages and adjacent territory; and when the people in the village and its adjacent territory, with almost entire unanimity, ask incorporation, it would seem to be a wilful disregard of the intention of the legislature in its borough legislation, and the rights of the people thereunder, to refuse them borough privileges.

130 Pa. 352-53.

of common pleas in this case that "the existing municipalities, not having encouraged nor provided incentives to the applicant or previous owners to develop the area, would now welcome the new development and, therefore, not suffer any significant adverse effects." (App. 14a.) Accordingly, the process of incorporation set forth in the Borough Code was designed to protect and actually did protect the interests of all nonresidents of the proposed borough.

CONCLUSION

It is clear that the constitutional issues now being raised were neither properly presented nor preserved in the Pennsylvania courts, and that, even assuming that they were, there is no merit to them. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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